Chip Fong (Kuala Lumpur) Sdn Bhd & Ors v Guardian Royal Exchange Assurance (Malaysia) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CODE NO D3-23-3460-87
ZAKARIA YATIM J
23 MAY 1991

Insurance *— Fire policy — Partial destruction of building — Cost of reinstating building — Whether insurer could deduct allowance for betterment of building from reinstatement cost — What was proper amount for deduction — Basis of calculation*

The defendant issued a fire policy in respect of a building owned by the first plaintiff. While the policy was in force, part of the first plaintiff's building was destroyed by fire. The first to third plaintiffs claimed for the cost of reinstatement of the building amounting to $133,000. The defendant agreed to indemnify the plaintiffs but however contended that allowance for depreciation or betterment of the building should be made. The defendant therefore alleged that applying the depreciating factor of about 1.5% pa for the unexpired life of the building, the sum to be paid under the policy should be $53,706. The senior assistant registrar gave judgment to the plaintiffs for the sum of $133,000. The defendant appealed.

Held, allowing the appeal in part:

(1) In considering the cost of reinstatement, the court has to consider either depreciation or betterment. In this case, the relevant factor is the principle of betterment which is to make an allowance so that the insured is not getting something new for something old.

(2) Considering the evidence in this case, the proper deduction was one-quarter of $133,000. The senior assistant registrar's order was varied accordingly.

[Bahasa Malaysia summary

Defendan telah mengeluarkan suatu polisi kebakaran berkenaan dengan bangunan kepunyaan plaintif pertama. Semasa polisi itu berkuatkuasa, sebahagian daripada bangunan plaintif pertama itu telah dimusnahkan oleh api. Plaintif pertama hingga ketiga menuntut kos pengembalian semula keadaan bangunan itu sebanyak $133,000. Defendan bersetuju untuk menanggung rugi plaintif tetapi walaupun demikian berhujah bahawa potongan kerana susutnilai atau pembaikan bangunan itu harus dibuat.

Defendan oleh kerana itu mengatakan bahawa dengan menggunakan faktor susutnilai kira-kira 1.5% pa bagi tempoh purata terdirinya bangunan itu yang belum habis, jumlah wang yang kena dibayar di bawah polisi itu adalah $53,706. Penolong kanan pendaftar memberi penghakiman kepada plaintif untuk jumlah wang $133,000. Defendan telah membuat rayuan.

Diputuskan, membenarkan sebahagian rayuan itu:

(1) Dalam mempertimbangkan kos pengembalian semula, mahkamah harus menimbangkan susutnilai ataupun pembaikan. Dalam kes ini, faktor relevan adalah prinsip pembaikan iaitu membuat potongan supaya pengambil insurans tidak mendapat sesuata yang baru sebagai ganti bagi sesuata yang lama.

(2) Memandangkan keterangan dalam kes ini, potongan wajar adalah suku daripada $133,000. Perintah penolong kanan pendafter kerana itu telah diubah.]

Case referred to

1 *Reynolds and Anderson v Phoenix Assurance Co Ltd & Ors* [1978] 2 Lloyd's Rep 442 (folld)

Khoo Eng Ching (Khoo & Sidhu) for the plaintiffs.
S Radhakrishnan (Shearn Delamore & Co) for the defendant.

Cur Adv Vult

Zakaria Yatim J: This is an appeal by the defendant against the decision of the senior assistant registrar given on 1 November 1989 ordering the defendant to pay the third plaintiff the sum of $133,000 together with interest at the rate of 6% pa from the date of the fire, which occurred on 18 October 1986, to the date of realization and costs.

The third plaintiff's claim against the defendant is for indemnity and damages under a Fire Policy No 002-016003-10 dated 16 February 1983, which was subsequently renewed to cover a period up to 18 January 1988 (hereinafter referred to as 'the said policy'). Under the said policy, a building situated at No 131, Jalan Petaling, Kuala Lumpur was insured for the sum of $300,000. The said policy was issued by the defendant in the name of the first plaintiff, who is the owner of the building and in the name of the third plaintiff as chargee. The third plaintiff was at all material times financially interested in the building in that the building was charged by the first plaintiff to the third plaintiff as security for banking/credit facilities. On 18 October 1986, that is, while the said policy was in force, fire broke out and destroyed part of the building.

It is not in dispute that part of the building was damaged by fire that occurred on 18 October 1986. It is also not in dispute that on that date the said policy was in force. Both parties agree that the policy is not a valued policy.

Although in its statement of defence, the defendant denied any liability, subsequently it agreed to indemnify the plaintiffs. Condition 14 of the policy gives the defendant the option to reinstate the damaged part of the building, that is to put the building back to its original position with no payment made to the insured. Condition 14 of the said policy states:

> The company may at its option reinstate or replace the property damaged or destroyed, or any part thereof, instead of paying the amount of the loss or damage, or may join with any other company or insurers in so doing, but the company shall not be bound to reinstate exactly or completely, but only as

circumstances permit and in reasonably sufficient manner, and in no case shall the company be bound to expend more in reinstatement than it would have cost to reinstate such property as it was at the time of the occurrence of such loss or damage, nor more than the sum insured by the company thereon.

The defendant has not exercised the option to reinstate the building. Instead it decided to pay the insured the cost of reinstatement. As a result of negotiations, both the defendant and the insured agreed on a figure that would represent the cost of reinstatement. The agreed sum is $133,000.

It is not in dispute that this figure is not the final figure. Mr Wong Chow Kong, who gave evidence on behalf of the insured, said that the figure was 'agreed upon subject to the determination of actual loss to the building...'.

The defendant contends that this figure does not make any allowance or reduction for depreciation or betterment. Mr S Radhakrishnan, counsel for the defendant, submitted that the defendant had adduced evidence to support its contention that deductions reflecting depreciation or betterment should be made in assessing the actual loss suffered by the insured. He urged the court to accept the sum in the region of $53,000 to $54,000 as the reasonable sum for which the insured should be compensated.

Mr Khoo Eng Chin, counsel for the third plaintiff, disagreed with the figure suggested by Mr Radhakrishnan. According to Mr Khoo, with that figure the building could not be repaired.

The issue before the court is what is the basis of calculation to award proper indemnity in the present case. There is no hard and fast rule laid down as the basis of calculation. The basis must be adopted which is best calculated in the circumstances of a particular case: ER Hardy Ivamy, *Fire & Motor Insurance* (4th Ed) at p 168.

The method of calculation adopted by the defendant is based on the evidence of the defendant's second witness, Mr Joseph McMahon, who is a chartered loss adjuster by profession. According to this witness, if the defendant paid the insured $133,000 it would mean that the insured would be getting new for old. He said that since the building was already old any reduction made should reflect the age, wear and tear and betterment. He estimated that the lifespan of the building in question was 100 years. He had ascertained that the building was erected in 1927 and at the time of the fire the building was 60 years old. Therefore, he said, the unexpired life of the building was 40 years which is 40%. He said that the depreciating factor was about 1.5% pa. Applying this formula, he concluded that the sum to be paid to the insured would be $53,706.

The witness seems to have embarked on a rigid mathematical calculation, the result of which is a figure which is less than half of the cost of the repair. I am unable to accept the figure.

I do accept the principle that in considering the cost of reinstatement the court has to take into consideration either depreciation or betterment. I am of the view, that, for the purpose of the present case, the relevant factor to be taken into consideration is the principle of betterment.

The principle is simply this. An allowance must be made so that the insured is not getting something new for something old. In *Reynolds and Anderson v Phoenix Assurance Co Ltd & Ors*,[1] Forbes J said:

> Now the principle of betterment is so well established in the law of insurance to be departed from at this stage even though it may sometimes work hardship on the insured. It is simply that an allowance must be made because the assured is getting something new for something old. But in this class of insurance there is no automatic or accepted percentage deduction. In some of the calculations put before me an attempt was made to establish a figure of 13.3 percent as the appropriate reduction for betterment. This figure has no validity...

MacGillivray & Parkington on *Insurance Law* (8th Ed) at pp 692 and 693, illustrates the principle of betterment in the following words:

> If an old house or an old article is destroyed or damaged and the assured replaces or repairs, he may end up with a house or article which is considerably better than the old and the question arises whether he should make any allowance to the insurers to the extent that he is better off after the loss than before. The conventional view is that such allowance should be made and in marine insurance custom has fixed an allowance of one-third 'new for old' which is said to be deductible. No such fixed allowance exists in non-marine insurance but an allowance is generally made to ensure that the assured does not make a profit out of his contract of insurance.

In the *Reynolds* case,[1] about 70% of the building was destroyed by fire. The estimated cost of reinstatement took into consideration that a great deal of second-hand material and inferior substances would be used. Forbes J was of the view that 'the figure for deduction...lies between a third and a quarter of the total...'. Based on this test, the learned judge held that, on the evidence in that case, the figure of deduction would be £10,000.

In the present case there is no evidence before me on the extent of the damage to the building. The only evidence adduced is that he building was only partially destroyed by fire. According to the evidence of the first defence witness, old materials could not be used to repair the building. He said that new materials had to be used to restore the building to its original position. He added that it was not possible to repair the building for a sum less than $133,000.

In my opinion the basis of calculation to determine the amount of reduction on account of betterment as laid down in the *Reynolds* case[1] applies to the present case. Having considered the evidence and all the circumstances in the present case I am of the view that the proper deduction is one-quarter of the agreed sum, that is $33,250.

The order of the senior assistant registrar is accordingly varied. Each party bears its own costs.

Order accordingly.

Reported by Wong Kian Kheong